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71-1240

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. _____

Supreme Court, U. S.
FILED
MAR 20 1972
MICHAEL RODAK, JR., CLERK

GEORGE CURTIS BIRD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No._____

GEORGE CURTIS BIRD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

George Curtis Bird petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause February 29, 1972.

REFERENCE TO OPINION BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit are not yet reported; a copy of each are appended hereto in Appendix, infra, pp. A1-3.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was delivered February 29, 1972. Motion for Rehearing was *not* filed.[1]

Jurisdiction to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether and by what standards the Fourth Amendment governs a search at location other than a port of entry of a motor vehicle which has not been shown to have crossed any external boundary of the United States nor its occupants to have committed any suspicious act by one whose duty, as an immigration officer, is to search for aliens and, as a customs patrol inspector, is to search for illegally imported merchandise.

2. Whether search of a motor vehicle and seizure of sacks and their contents discovered in the vehicle by an immigration officer at a highway checkpoint who had conducted a futile search for aliens but did not have probable cause to believe the sacks contained contraband may be constitutionally upheld on standards other than mandated by the Fourth Amendment to the United States Constitution because the searching officer has also been designated a customs patrol inspector of the Customs Service.

3. Whether under the circumstances of this case the Court of Appeals properly affirmed denial of a trial motion for judgment of acquittal contending "the evidence is insufficient to sustain a conviction" of the offense charged by finding that the evidence was "sufficient to create an issue for the jury" as to essential elements of the offense charged.

[1] All emphasis throughout is supplied by the writer of this Petition unless otherwise specified.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

2. 8 U.S.C. § 1357(a)(3), relating to immigration officers, provides:

> "(a) Any officer of employee of the service authorized under regulations prescribed by the Attorney General shall have power without warrant –
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and"

3. 19 U.S.C.A. § 482, relating to customs officers, provides:

> "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported

contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial."

4. 21 U.S.C. § 176 a, since repealed, provided in pertinent part:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imparts or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five nor more than twenty years and, in addition, may be fined not more than $20,000. * * * "

STATEMENT OF THE CASE

At about 11:00 p.m., traveling north on an interstate highway from Laredo, Texas, a pick-up truck with a camper on it was stopped at a Border Patrol checkpoint approximately eight or nine miles from the international boundary. Petitioner was a passenger in the cab of the pick-up being driven by one Melvin D. Anderson.[2] Observation and inquiry by Border Patrolman William Randolph, Jr. determined that occupants of the vehicle were Anglo-Americans, citizens of the United States and residents of Taos and Santa Fe area of New Mexico. Looking through

[2] Before trial proceedings in this matter Anderson was killed in an automobile accident.

the back window of the pick-up into the camper area, and noticing compartments in the camper, Randolph directed Anderson to pull the vehicle over to the side of the highway "for a secondary inspection." Anderson alighted from the cab, opened the camper door, got in the camper, handled a big dog and at the direction of Randolph opened the first, a compartment on the left side and then one on the right in which, with aid of his flashlight, Randolph observed, just some tools and things. Randolph then asked that a third compartment situated right behind the cab of the pick-up be opened. Anderson did so and according to Randolph:

"Q. But it was high enough up so that you could see there was no aliens?"
A. The third time, yes.
Q. Were these men then free to go at that time, or had you determined that you were going to find out what was in the sacks?
A. I saw the sacks and they appeared to be Mexican coffee sacks, a large coffee sack, and I asked Mr. Anderson, 'I sure would like to know what is in those sacks.'
Q. At that time your suspicions were aroused and you were not going to let them go until you found out what was in the sacks, is that right?
A. Yes, sir.
Q. And you at that time were suspicious that those sacks might contain marihuana, is that right?
A. Yes, sir.
Q. And you were not going to let them go, you were not going to let them proceed forward until you found out whether your suspicions were correct or not, is that right?
A. That's correct."

Determining that the sacks contained marihuana, Randolph arrested Petitioner and Anderson, took them to a border patrol office with the pick-up and then turned subjects and pick-up and contraband over to customs officer Cox for

further handling.[3] From his interrogation of Petitioner, Cox learned that as a consequence of being approached in Albuquerque, New Mexico by a man who asked him to do so, Petitioner and Anderson went to Laredo and, leaving keys in the pick-up, checked in a motel; that someone unknown to him drove the pick-up away and about an hour later returned it, they checked and found, marijuana; that they waited until dark and proceeded away from Laredo until stopped at the checkpoint. Of eighty-six packages contained in four sacks, eighty-five were wrapped in cellophane and plastic and one was in a cardboard box, Government Ex. No. 8, that was found by Randolph near the bottom of the sack (App. 51). Upon inquiry by Agent Cox, Petitioner indicated that "this was a special quality marijuana known as Acapulco Gold, which this Negro male in Albuquerque had arrangements (sic) to obtain himself and for defendant Anderson" (App. 62).[4]

Indicted for violation of 21 U.S.C. § 176(a) by smuggling marijuana into the United States and by transporting and facilitating transportation and concealment of marijuana and for violation of 26 U.S.C. § 4744(a)(2) by being a transferee without having paid the required transfer tax, Petitioner moved to suppress fruits of search, arrest and seizure made by Border Patrolman Randolph as violations of his Fourth and Fifth Amendment rights (App. 93-94). Upon hearing the District Court denied motion to suppress.

[3] Randolph also carried an identification card designating him a Customs Patrol Inspector of the Customs Service, but admitted that he had acted in capacity of an immigration officer, had never received training as a customs officer and had only worked with customs officers on one occasion – during operation intercept.

[4] In material significant respects, the opinion of the Court of Appeals misconstrues uncontradicted recitation by Cox of what Petitioner related to him: The Negro male in Albuquerque asked him to haul "a load of marihuana" (App. 60) – not, as the Court of Appeals would have it, "a special strain of marihuana known as Acapulco Gold;" when the pick-up was returned by an unknown person, Petitioner and Anderson "checked and found the marihuana in the truck" (App. 60) – not that Petitioner "observed that the Acapulco Gold was present." As pointed out in the text above, only the cardboard box was indicated by Petitioner to Cox at the Border Patrol Station to be Acapulco Gold – the source of which is not shown in this record.

At trial Petitioner was arraigned only on first and second counts. When the Government rested, Petitioner moved for judgment of acquittal for failure of proof that marijuana was smuggled from Mexico and that Petitioner knew it had been illegally imported. The district court denied the motion but submitted only Count Two – transporting and facilitating transportation and concealment of marijuana, knowing it to have been imported contrary to law. After a jury verdict of guilty the district court imposed a sentence of six years confinement and a fine of $2,500.00 to be paid.

Appeal to the United States Court of Appeals followed. Relying almost exclusively on *United States v. Maggard,* F. 2d (5 Cir., 1971) (No. 27170, December 3, 1971) – a case that demonstrably is factually distinguishable from the instant one – the opinion of the appellate court holds that because the compartment was large enough to conceal an alien Randolph was entitled to search it; once he viewed the coffee sacks Randolph, as a commissioned customs officer, had authority to inspect the sacks – and upheld the search and seizure. Reciting its version of the facts (shown in footnote 4, supra, to be inaccurate in major respects) the opinion found that the evidence, as recited by it, was "sufficient to create an issue for the jury as to whether the marijuana was illegally imported and the defendant had knowledge thereof." Accordingly, judgment of conviction was affirmed.

REASONS FOR ALLOWANCE OF WRIT

While *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280 (1925) established the rule that an automobile or other vehicle may constitutionally be searched without a warrant, it also held unequivocally, 267 U.S. at 154, 45 S. Ct. at 285:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national

> self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a free right of passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The rule was reiterated in *Husty v. United States*, 282 U.S. 694, 51 S. Ct. 240 (1931) and the holding reaffirmed in *Brinegar v. United States*, 338 U.S. 160, 176-177, 69 S. Ct. 1302, 1311 (1949), rejecting the assumption "that every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion." *Carroll's* teachings were examined and approved more recently in *Chambers v. Maroney*, 399 U.S. 42, 48-51, 90 S. Ct. 1975, 1979-1981 (197),. and just lately in *Coolidge v. New Hampshire*, U.S. , 90 S. Ct. 2022, 2033-2036 (1971). Thus for 45 years the Supreme Court has continued to insist that the right of a citizen "who has given no good cause for believing" that he is engaging his motor vehicle in illegal activity on a public highway "to proceed on his way without interference," *Brinegar*, supra, 338 U.S. at 176-177, 69 S. Ct. at 1311, remain protected under the Fourth Amendment.

Elsewhere, however, particularly in the Fifth and Ninth Circuits, Fourth Amendment protections for the traveling citizen are being weakened, if not denied, by decisions that speak of "border searches," "customs searches," "border officials," "check points," "immigration inspections," "suspicion," "reasonable suspicion," "reasonableness," "probable cause" and leave confusion and uncertainty in their wake. To avoid unduly lengthening this point by an exhaustive exploration of origins and twistings and turnings of the many opinions that have dealt with the problems, the reader is respectfully referred to *United States v. Almeida-Sanchez*, 452 F. 2d 459 (9 Cir., 1971) where they are collated and discussed in a thoughtful dissenting opinion beginning at 452 F. 2d 461. With that, a brief look at what appear to be some typical

contradictions may suffice to show the pressing need for a clear or authoritative expression by the Supreme Court.

Take *United States v. Maggard,* F. 2d (5 Cir., 1971) (No. 21170, Dec. 3, 1971), a copy of which is appended hereto in Appendix, infra, pp. A3-5. An excellent example of the problem, it was relied upon exclusively by the Court of Appeals to uphold search and seizure in the instant case. *Maggard* points out that a car was stopped "by *border patrol officers* at a checkpoint 8 miles north of Laredo" who, after permitting Maggard to pass through, noticed his car was riding low and, realizing "the possibility that defendant was *transporting illegal aliens* into the country," pursued and again stopped the car and searched its trunk – finding a plastic bag containing recognizable marihuana. With respect to the challenged search, the *Maggard* opinion finds it "*undisputed* that border officials are authorized to establish checkpoints within a reasonable distance from a border crossing and, without a warrant, conduct searches for contraband," citing 19 U.S.C.A. § 482 (1964) – a provision that heretofore has *not* been considered authority for an *immigration* officer, a border patrolman, but for a customs officer who under it must nevertheless have "reasonable cause to suspect" a vehicle contains illegally imported merchandise; see e.g., *Morales v. United States,* 378 F. 2d 187 (5 Cir., 1967) and cases there cited. On the other hand, according to the Ninth Circuit, "checkpoints" are established away from a border by *immigration* officers under 8 U.S.C. § 1357 for the purpose of detecting illegal aliens, *Duprez v. United States,* 435 F. 2d 1276 (9 Cir., 1970); *Miranda v. United States,* 426 F. 2d 283 (9 Cir., 1970).

Moreover, *Maggard* had "no trouble in concluding that this search" – by immigration officials claiming to suspect illegal aliens – "qualifies as a *border search.*" Yet the Ninth Circuit has insisted that a stop by an immigration officer to investigate for illegal aliens is simply not a "border search," *Duprez,* supra, and *Miranda,* supra.

Finding it "clear that border officials need less cause to initiate a search than is required of law enforcement officers in other circumstances," *Maggard* cites cases treating powers of customs agents. The opinion says that "border searches" are tested by "reasonable suspicion rather than that of probable

cause," and relies on a case involving search of the person of a Chinese seaman who had just left a shore launch by customs agents acting on reliable information,[5] and a case involving a stop at a roadblock set up by state officers at request of a customs agent who had what he considered reliable information that driver of the vehicle had obtained heroin in Mexico.[6]

An additional difficulty posed by the *Maggard* opinion, and also present in the instant case, is that it finds support in the "border search" doctrine when there is no showing whatsoever that the Maggard vehicle or its occupants, or the vehicle and the occupants in the instant case, had entered the United States from Mexico[7] or, if they had, that entry was not complete.[8]

In the Ninth Circuit the situation has reached a point where an opinion that purported to clarify and reconcile many prior decisions of that court into two rules, *Fumagalli v. United States*, 429 F. 2d 1011 (9 Cir., 1970)[9] brought a later charge by a dissenting member of the court in *Almeida-Sanchez v. U. S.*, 452 F. 2d 459, 461-468 (9 Cir., 1971) that it and similar decisions in the Ninth Circuit "are so clearly at odds with the requirements of the Fourth Amendment that they should be overruled," pointing out: "Despite our recognition that the probable cause requirement of the Fourth Amendment applies to all searches by Customs officials for smuggled merchandise except border searches, this court, alone among the Courts of Appeals, has expressly refused to impose the probable cause restriction upon searches for illegally entered aliens conducted by Immigration and Naturalization officers . . . whether or not

[5] *United States v. Tsoi Kwan*, 416 F. 2d 306 (5 Cir., 1969).

[6] *Walker v. United States*, 404 F. 2d 900 (5 Cir., 1968).

[7] "No case has held that one who has not crossed an international boundary can be the object of a constitutionally permissible border search . . .," *Bailey v. United States*, 386 F. 2d 1 (5 Cir., 1967). See, however, *United States v. Weil*, 432 F.2d 1320 (9 Cir., 1970).

[8] Compare *Thomas v. United States*, 372 F. 2d 252, 254 (5 Cir., 1957); and see *Marsh v. United States*, 344 F. 2d 317 (5 Cir., 1965).

[9] "What all these cases make clear is that probable cause is not required for an *immigration* search within approved limits but is generally required to sustain the legality of a search for *contraband* in a person's automobile conducted away from the international boundary." (Emphasis by the court.)

the search in question could qualify as a 'border search' under the tests discussed above," and adding:

> "If a reason exists for distinguishing searches for aliens from searches for merchandise, no one – including this court – has suggested what it might be. Nothing in the words of the Constitution supports the decision. And no one suggests that the public interest in excluding inadmissible aliens is greater than that in excluding narcotics and other contraband."

While raised in a different context some of the problems presented here were obviously thought to be significant in *United States v. Johnson,* 425 F. 2d 630 (9 Cir., 1970), certiorari granted, 400 U.S. 990 (1971), argued as No. 577, April 19, 1971 and later set for reargument but dismissed under Rule 60(2), 92 S. Ct. 38.

Leaving the confusion and disagreements among and between the Fifth and Ninth Circuits, one notes that the views of the Tenth Circuit, expressed in *Roa-Rodriquez v. United States,* 410 F. 2d 1206 (10 Cir., 1969) seem to agree in part with those of the Ninth but depart from those of the Fifth in other respects. There authority of immigration inspectors to stop and search an automobile for aliens was confirmed but at the same time restricted to a search for that purpose, prohibiting a general search for law violations and holding invalid a search of the trunk of the automobile and a jacket found therein.

In sum, it appears that decisions of the several circuits are in conflict with each other on the same matter and decide important questions of federal law implicating the Fourth Amendment which appeared to conflict with the dictum of *Carroll* and *Brinegar,* supra, and should be settled by the Supreme Court.

The instant case is an appropriate vehicle for, by relying on *Maggard,* supra, it directly presents for determination the meaning and extent of "border searches," the constitutional basis and scope of authority of an immigration officer to search a motor vehicle for illegal aliens and then, finding none, the constitutional basis and scope of his claimed authority to act as a customs agent to search a compartment in the vehicle and inspect what appear to be sacks and seize their contents.

In addition, the presumption of importation and knowledge thereof arising from repealed Section 176a of Title 21 – see *Leary v. United States*, 395 U.S. 6, 895 Ct. 1532 (1969) – not being charged here, this case presents an opportunity to determine the evidentiary standards by which a motion for judgment of acquittal should be determined. Erroneous findings of the Court of Appeals regarding "Acapulco Gold" have been pinpointed;[10] it further should be noted that the coffee sacks with Spanish language markings were the type of sack Randolph had seen regularly and legally imported (Appendix 52).[11] Curiously enough, the district court was most impressed by distance travelled by Petitioner and Anderson[12] – surely an ambigious circumstance more consistent with innocence than guilt; and when one considers that Nogales, Juarez and other points on the Mexican border are much closer sources of supply of Mexican marijuana to Albuquerque, the distance to Laredo has little probative value. Dearth of evidence of importation and knowledge thereof is, accordingly, apparent.

[10] See Footnote 4.

[11] "It just appeared to be a coffee sack. I have seen the coffee bean sacks that they import here in the customs lot, and it just appeared to be that type of sack" – "the type of sack that (I) have seen imported with coffee beans into the United States . . ."

[12] "As I see it probably the most cogent evidence on that point is the simple fact that these two young men would drive from Albuquerque, New Mexico, a distance of six or eight hundred miles, I suppose, to Laredo here on the Mexican border to pick it up."

CONCLUSION

For the reasons set forth above, petition for a writ of certiorari should be granted and on further hearing on the merits the opinion and judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and remanded or, alternatively, the prosecution ordered dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sam Houston Clinton, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on counsel for Respondent by depositing same in the United States mail, postage prepaid, addressed to Honorable Anthony J. P. Ferris, United States Attorney, Attention: Anthony C. Aguilar, Assistant United States Attorney, 515 Rusk Avenue, Houston, Texas 77002, and upon Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D.C. 20530, this day of March, 1972.

Sam Houston Clinton, Jr.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 71-2832
• Summary Calendar*
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
vs.
GEORGE CURTIS BIRD, *Defendant-Appellant*

Appeal from the United States District Court for the Southern District of Texas

(February 29, 1972)
Before BELL, DYER and CLARK,
Circuit Judges

PER CURIAM: Bird appeals from a jury conviction of facilitating the transportation of illegally imported marihuana, knowing the same to have been illegally imported in violation of 21 U.S.C.A. § 176a (1961). We affirm.

Bird maintains that the evidence was insufficient to infer a knowledge of illegal importation and was insufficient to show that the marihuana had actually been illegally imported. Considered in the light most favorable to the Government, the proof showed Bird knew the following facts. He was hired by a man in Albuquerque, New Mexico to travel over 800 miles to Laredo, Texas, a city on the Mexican border, to pick up a special strain of marihuana known as Acapulco Gold and transport it back to Albuquerque. Bird and a companion checked into a Laredo motel and left their pick-up in the motel parking lot with the keys in the ignition. Subsequently some unknown person drove off in the pickup and remained away for approximately an hour. When the truck was returned, Bird looked into the special compartment mounted on the pickup bed and observed that the Acapulco Gold was present. Bird and his companion thereupon began their journey back to Albuquerque, but were arrested at a border check point 8 miles north of Laredo. A search of the compartment revealed one hundred and sixty-eight pounds of marihuana in three Mexican coffee sacks with Spanish language markings, and in one American bag marked "Beans". This evidence was sufficient to create an issue for the jury as to whether the marihuana

* Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

was illegally imported and the defendant had knowledge thereof. *See United States v. Maggard,* F.2d (5th Cir. 1971) [No. 27170, December 3, 1971].

Bird next asserts that the marihuana should have been suppressed as the fruits of an illegal search and seizure. Bird contends that the immigration officials could not search the compartment without probable cause since it was not a spot likely to contain aliens. But even if it were, Bird argues that these officials could not examine the sacks since certainly no aliens could be hidden in coffee sacks. The compartment, which was six feet by three feet by twenty inches, was large enough to conceal an alien. In fact, it was the only enclosed area of the truck in which an alien could be secreted. Furthermore, once the compartment was opened and the coffee sacks came into view, these officials, who had also been commissioned as Customs Officers, had the authority to inspect the sacks. *See United States v. Maggard, supra.*

Finally, Bird contends that only hearsay evidence was presented at his preliminary hearing and to the grand jury. This point is without merit. *See United States v. Klaes,* F.2d (5th Cir. 1972) [No. 71-2765, February 4, 1972].

The judgment is affirmed.

UNITED STATED COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1971
No. 71-2832
Summary Calendar
D. C. Docket No. 71-L-307
UNITED STATES OF AMERICA, *Plaintiff-Appallee,*
vs.
GEORGE CURTIS BIRD, *Defendant-Appellant*

Appeal from the United States District Court
for the Southern District of Texas

Before BELL, DYER and CLARK,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued As Mandate: March 21, 1972

February 29, 1972

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 27170
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
vs.
DAVID L. MAGGARD, *Defendant-Appellant*

Appeal from the United States District Court
for the Southern District of Texas

(December 3, 1971)
Before TUTTLE, THORNBERRY and INGRAHAM,
Circuit Judges.

INGRAHAM, Circuit Judge: Appellant was tried by a jury on October 3, 1968, on an indictment charging him with smuggling seven pounds of marihuana into the United States from Mexico, transporting such marihuana knowing the same to have been illegally imported, both in violation of Title 21, U.S.C.A., Section 176a, and failing to pay the transfer tax on such marihuana in violation of Title 26, U.S.C.A., Section 4744(a)(2).

After a directed verdict was entered on the smuggling count, the jury found defendant guilty on both the transportation and transfer tax counts. The district court set sentence at ten years on each count, to run concurrently.

Defendant abandoned his original appeal, but this Court, on November 24, 1970, granted his motion to file this direct appeal out of time. We affirm.

The record before us indicates that defendant and a companion were driving in their car when stopped by border patrol officers at a checkpoint 8 miles north of Laredo, Texas, on August 3, 1968. After questioning defendant somewhat and making a cursory examination of the contents of his back seat, the border patrol officers allowed defendant to pass. As the car passed through the checkpoint the officers noticed that the rear of the car was riding low. Realizing the possibility that defendant was transporting illegal aliens into the country from

Mexico, the officers followed him up the road approximately 2 miles, stopped his car, and searched his trunk. The headlights of the border patrol car were directed into the open trunk, whereupon the officers observed in plain sight *a plastic bag through which they recognized particles of marihuana.* The plastic bag in which the marihuana was carried had writing in Spanish on it, which indicated that the bag was from a Mexican brand of detergent. Upon demand of customs agents, defendant was unable to produce a United States Treasury transfer order form for the seized marihuana.

Defendant first challenges the search which resulted in the marihuana discovery. It is undisputed that border officials are authorized to establish checkpoints within a reasonable distance from a border crossing and, without a warrant, conduct searches for contraband. *See, e.g.,* 19 U.S.C.A. § 482 (1964). In the instant case defendant contends that the search of his car cannot qualify as a border search because he had already been cleared by the agents at the checkpoint. This contention ignores clear language in *United States v. Hill,* 5th Cir. 1970, 430 F. 2d 129, to the effect that the class of persons subject to a border search includes "persons and vehicles after they have cleared an initial customs checkpoint." A suspect is therefore not immune from further examination by customs agents merely because he may momentarily escape and pass safely through the first customs check. *Thomas v. United States,* 5th Cir. 1967, 372 F.2d 252. *See also Jones v. United States,* 9th Cir. 1963, 326 F.2d 124, *cert. denied,* 377 U.S. 956, 84 S.Ct. 1635 (1964). We have no trouble in concluding that this search, taking place within 2 miles and only a few minutes from the initial checkpoint and precipitated by facts appearing at the initial check, qualifies as a border search.

It is clear that border officials need less cause to initiate a search than is required of law enforcement officers in other circumstances. *Marsh v. United States,* 5th Cir. 1965, 344 F.2d 317; *Ramirez v. United States,* 5th Cir. 1959, 263 F.2d 385; *King v. United States,* 5th Cir. 1958, 258 F.2d 754. Border searches are governed by the test of reasonable suspicion, rather than that of probable cause. *United States v. Tsoi Kwan Sang,* 5th Cir. 1969, 416 F.2d 306; *Walker v. United States,* 5th Cir. 1968, 404 F.2d 900. Under this standard, defendant's nervousness and suspicious behavior at the checkpoint and the automobile's appearance of being weighted in the rear furnished a reasonable basis for the federal agent's search for illegal aliens in the trunk. The marihuana's location on top of the luggage in the trunk easily satisfies the "plain view" test. *See Coolidge v. New Hampshire,* U.S. , S. Ct. (1971) (39 U.S.L.W. 4795, June 22, 1971).

Defendant next contends that evidence was insufficient to convince a

jury beyond a reasonable doubt of his guilt on the transportation count. This is based on his assertion that there was no evidence that the marihuana was imported. Viewing the facts as they appear most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457 (1942),[1] the record shows the following. The defendant possessed a plastic bag containing marihuana. The bag had Spanish printing on it and was later determined to be a bag from a brand of Mexican detergent. Defendant admitted obtaining the bag in Laredo, Texas from a "Mexican." These circumstances are coupled with the fact that defendant was engaged on a trip from the interior of the country to the Mexican border, across which it is common knowledge that large quantities of narcotics are smuggled daily. We find these facts sufficient to permit a jury inference that the marihuana came from Mexico and that the defendant had knowledge thereof.

Finding no error in defendant's conviction on the transportation count, under the concurrent sentence doctrine we have no reason to consider his allegations of error in regard to the transfer tax count. *United States v. Boatwright*, 5th Cir. 1971, F.2d (No. 3119, August 11, 1971); *Juarez v. United States*, 5th Cir. 1968, 394 F.2d 161, *cert. denied*, 393 U.S. 942, 89 S.Ct. 311.

AFFIRMED.

[1]The district court wisely avoided charging the jury on the presumption of importation on this county. We, therefore, are not presented with the issue of the retroactivity of *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532 (1969). *See United States v. Reinosa*, 5th Cir. 1970, 427 F.2d 150; *United States v. Pruneda*, 5th Cir. 1970, 425 F.2d 1289; *Walden v. United States*, 5th Cir. 1969, 417 F.2d 698.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1240

GEORGE CURTIS BIRD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A1-A2) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2-A3) was entered on February 29, 1972. The petition for a writ of certiorari was filed on March 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case a border search and seizure by an immigration and customs officer violated the Fourth Amendment.

2. Whether petitioner's conviction is supported by sufficient evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of having facilitated the transportation of 168 pounds of illegally imported marihuana, in violation of 21 U.S.C. (1964 ed.) 176a, and was sentenced to six years' imprisonment and fined $2,500. The court of appeals affirmed *per curiam* (Pet. App. A1–A2).

The evidence showed that on January 29, 1971, at approximately 11:00 p.m. a pickup truck carrying a sleeping compartment ("camper") was stopped at a Border Patrol checkpoint some eight miles north of Laredo, Texas, on Interstate Highway 35. Melvin D. Anderson [1] owned and was driving the truck, which had New Mexico license plates, and petitioner was a passenger (Tr. 8, 46–49). Border Patrolman William Randolph, Jr.—who was authorized both as an immigration officer and as a customs agent (Tr. 29–30, 33)—asked their citizenship and, because of the camper, requested that they stop at the side of the road for a secondary inspection (Tr. 8, 47).

While petitioner remained in the truck, Anderson went to the back of the camper and, at the agent's request, opened three compartments which ran on

[1] Before the trial herein, Anderson was killed in an automobile accident.

both sides and across the width of the truck (Tr. 10, 20, 48–49). The compartments on the sides were approximately five feet in length, about seventeen inches in width and about fourteen inches in height (Tr. 10). They were opened with no difficulty and contained tools and other miscellaneous objects (Tr. 10, 20). The compartment next to the cab of the truck was larger, with dimensions of 6 feet in length, 20 inches in height and 3 feet in width (Tr. 10), and it would not open. Anderson asked petitioner through the back window of the truck for a screwdriver. With this he pried the lid up two or three inches and let it close; he opened it again a little wider, and asked if the agent had seen enough. The agent replied no, and the lid was opened wider. In the process the agent detected an odor that was "different than it was normally in the truck" and shined his flashlight into the compartment. He observed two large burlap sacks with Spanish writing on them which are commonly used to keep coffee beans (Tr. 12, 49–50, 54). When Anderson closed the compartment, the agent stated that he would like to know what was in the bags. Anderson replied "You know." When the agent asked if it was marihuana, Anderson nodded his head affirmatively (Tr. 12, 49–50). At this point, both petitioner and Anderson were arrested and advised of their rights (Tr. 15, 52). Two other large sacks containing marihuana were found in the compartment, one with Spanish writing on it and the other with the English word "Beans" (Tr. 54).

Melvin M. Cox, a special agent with the Bureau of Customs, later questioned petitioner at the Border

Patrol Station after advising him of his rights. Cox testified that petitioner initially indicated that he would not cooperate. Petitioner then related that a Negro male approached him in the La Honda Motel in Albuquerque, New Mexico, and hired him to deliver marihuana from Laredo, Texas, to Albuquerque for a sum of money. Anderson accompanied petitioner to Laredo, where they stayed at the El Rey Motel and left the truck outside with the keys in the ignition. On the evening of January 29, 1971, an unknown person took the truck for approximately an hour. When it was returned, petitioner and Anderson found the marihuana in the truck and completed plans to return to Albuquerque (Tr. 64–68).

At the close of the government's case petitioner made a motion for acquittal, which the trial judge denied. The defense then rested (Tr. 78–79).

ARGUMENT

1. Petitioner contends that the search of the Anderson truck and the seizure of evidence were unlawful under the Fourth Amendment, apparently on the ground that there was no probable cause (Pet. 7–11). However, this was a border search conducted by immigration and customs officers. As the court below concluded, the search and seizure here fully comport with established principles applicable to such searches.

Immigration officers have the power to conduct a warrantless search of vehicles for aliens within 100 air miles of any external boundary. 8 U.S.C. 1357(a)(3); 8 C.F.R. 287.1(a)(2). Probable cause is not required for such a search. *E.g., Duprez* v. *United*

States, 435 F. 2d 1276, 1277 (C.A. 9). The principal limitation upon the power of border patrol agents to check for aliens without a warrant is that they may not search places in which no person could hide. See *Valenzuela-Garcia* v. *United States,* 425 F. 2d 1170, 1172 (C.A. 9). Furthermore, under the customs laws (19 U.S.C. 482), border officials are authorized to establish checkpoints within a reasonable distance from a border crossing and, without a warrant, to conduct searches for contraband if there is a reasonable suspicion that a person is carrying unlawfully imported merchandise. See *Morales* v. *United States,* 378 F. 2d 187 (C.A. 5). As in this case, border officials at established checkpoints generally are authorized as both immigration officers and customs agents.

The search and seizure in the present case were proper. The initial search of the vehicle was valid under the immigration laws. The truck was stopped at 11:00 p.m. at an established checkpoint only eight miles from (and going north, away from) the border. Patrolman Randolph was told that petitioner and Anderson had visited Laredo, Texas, on the border. He testified that at this checkpoint he had found smuggled aliens every day and that in many cases he had found them concealed in campers, such as the one attached to the truck in which petitioner was riding. Thus, the agent properly checked to see if aliens were hidden in the camper, or in the compartments on the inside which were large enough to conceal a person. Compare *United States* v. *Saldana,* 453 F. 2d 352 (C.A. 10). Although the agent found no aliens, he noticed a different odor and saw the sacks with Span-

ish writing, from which he reasonably suspected that contraband might be involved. He was, therefore, justified in conducting a further search in his capacity as a customs agent. He did not do so, however, but instead only asked what was in the sacks. When Anderson admitted that the sacks contained marihuana, the agent had clear authority under the customs law to reopen the compartment and seize the sacks. On these facts, there was no violation of the Fourth Amendment. See *United States* v. *Maggard,* 451 F. 2d 503 (C.A. 5), certiorari denied April 3, 1972, No. 71–6006; *Fumagalli* v. *United States,* 429 F. 2d 1011 (C.A. 9).[2]

There is no merit to petitioner's contention that the decision below conflicts with other court of appeals decisions. On the contrary, the decision here follows the approach taken by other courts of appeals. The legality of a border search turns on the particular facts presented, and the location of the checkpoint and the purpose and the extent of the search are the determinative factors. While, as petitioner notes, there are differences in outcome in various cases, that

[2] The fact that the immigration and customs statutes permit search of a vehicle on less than probable cause at locations not actually at the border does not contravene the Fourth Amendment. It is generally accepted that these statutes represent a lawful exercise of Congress' power to protect the boundaries of this country against illegal entry of aliens and unlawful imports. *See United States* v. *Miranda,* 426 F. 2d 283, 284 (C.A. 9); *Morales* v. *United States,* 378 F. 2d 187, 189 (C.A. 5); see also *United States* v. *Almeida-Sanchez,* 452 F. 2d 459 (C.A. 9), petition for a writ of certiorari pending, No. 71–6278.

is the result of differing facts rather than differences in the legal principles applied.[3]

2. Petitioner also suggests (Pet. 12) that there was insufficient evidence showing importation and knowledge. By his own admission, however, petitioner agreed to bring marihuana from Laredo, Texas—on the border—to New Mexico. He also knew that some of the marihuana was Acapulco Gold, a special strain. He and Anderson waited until dark to leave Laredo. The court of appeals correctly held that "[t]his evidence was sufficient to create an issue for the jury as to whether the marihuana was illegally imported and the [petitioner] had knowledge thereof" (Pet. App. A1–A2).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1972.

[3] For example, the decision in *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (C.A. 10)—to which petitioner refers (Pet. 11)—is consistent with the decision below. In that case, a car was stopped at a random checkpoint and its trunk was searched for aliens. Although the trunk contained no aliens, it did contain a jacket which was searched and found to contain narcotics. The court held that the search of the trunk was lawful, but that the jacket could not be searched either under the immigration or the customs laws since the search for aliens had ended and there was no reasonable suspicion to support a search for contraband.

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